

**July 28, 2010: WORKING DRAFT – FOR DISCUSSION PURPOSES ONLY**

**Disclaimer:** This is a preliminary working draft of a Water Rights Compact that could be part of a comprehensive water rights settlement among the Confederated Salish & Kootenai Tribes, the State of Montana, and the United States. As with any negotiation of a complex settlement of litigation and other issues, nothing in this document is agreed to until everything is agreed to by the three parties. When it is ultimately completed, this Compact is intended to be accompanied by an Ordinance (a draft of which has already been released to the public and which itself needs substantial further work and revision), and a package of changes to State law which collectively will lay out the Tribes' water rights, and how all water is to be administered within the boundaries of the Flathead Indian Reservation. The draft is structured under the general format of other Montana Water Rights Compacts. It cannot be emphasized strongly enough that the following draft is merely an initial effort at identifying as many as possible of the issues that need to be addressed in the settlement negotiations, and suggesting some approaches for dealing with at least some of them. It is best viewed as the early stage of a work in progress. Language that is italicized and in brackets, see for example definition #25 on page 5, is under review by one or more parties.

**WATER RIGHTS COMPACT  
ENTERED INTO BY  
THE CONFEDERATED SALISH & KOOTENAI TRIBES,  
THE STATE OF MONTANA, AND  
UNITED STATES OF AMERICA**

This Compact is entered into by and among the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United States of America to settle all existing claims to water of or on behalf of the Confederated Salish & Kootenai Tribes within the State of Montana.

**ARTICLE I – RECITALS**

WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation; and

WHEREAS, pursuant to said Treaty, the Confederated Salish & Kootenai Tribes claim reserved and aboriginal water rights to fulfill the purposes of the Treaty and the Reservation; and

WHEREAS, in 1979, the United States, on its own behalf and on behalf of the Confederated Salish & Kootenai Tribes, their members and Allottees brought suit in the United States District Court for the District of Montana to obtain a final determination of the Tribes' water rights claims, see United States v. Abell, No. CIV-79-33-M (filed April 5, 1979); and

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WHEREAS, as a result of Congressional action and subsequent judicial interpretation, state courts have been found to possess, under certain circumstances, adjudicatory jurisdiction over federal reserved water rights held in trust by the United States for the benefit of Indians; see, McCarran Amendment 43 U.S.C. 666; *Colorado River Conservation District v. United States*, 42 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes claims regarding the Confederated Salish & Kootenai Tribes' water rights; and

WHEREAS, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate settlement of water rights claims filed by Indian tribes and/or on their behalf by the United States claiming reserved waters within the State of Montana; and

WHEREAS, the Federal district court litigation was stayed in 1983 pending the outcome of Montana State court water adjudication proceedings, see Northern Cheyenne v. Adsit, 721 F.2d 1187 (9th Cir.,1983); and

WHEREAS, the adjudication of Confederated Salish & Kootenai Tribes' water rights in the State court proceeding has been stayed while negotiations are proceeding to conclude a compact resolving all water rights claims of the Confederated Salish & Kootenai Tribes; and

WHEREAS, the Confederated Salish & Kootenai Tribes, or their duly designated representatives, have authority to negotiate the Compact pursuant to Article 6, Section 1, subsections (a), (c), and (u) of the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes said Constitution adopted and approved under Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended; and

WHEREAS, the United States Attorney General, or a duly designated official of the United States Department of Justice, has authority to execute the Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. sections 516-17 and appropriate federal legislation as identified in Article VIII.B; and

WHEREAS, the Secretary of the Interior, or a duly designated official of the United States Department of the Interior, has authority to execute the Compact on behalf of the United States Department of the Interior pursuant to 43 U.S.C. 1457, inter alia, and appropriate federal legislation as identified in Article VIII.B; and

WHEREAS, the Confederated Salish & Kootenai Tribes, the State of Montana, and the United States agree that the Tribal Water Right described in the Compact, subject to the

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provisions of the Act of Congress identified in Article VIII.B, is in satisfaction of the water rights claims of the Tribes, their members and Allottees, and of the United States on behalf of the Tribes and their members and Allottees; and

WHEREAS, the Parties agree that it is in the best interest of all Parties that the water rights claims of the Confederated Salish & Kootenai Tribes be settled through agreement between and among the Tribes, the State of Montana, and the United States;

NOW THEREFORE, the Parties agree to enter into the Compact for the purpose of settling the water rights claims of the Confederated Salish & Kootenai Tribes, their members, and Allottees of the Flathead Indian Reservation and of the United States on behalf of the Tribes, their members and Allottees.

**ARTICLE II- DEFINITIONS [This section is under development]**

The following definitions shall apply for purposes of the Compact:

1. “Acre-foot” or “Acre-feet” or “AF” means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet of water.
2. “Acre-Feet per Year” or “AFY” means an annual quantity of water measured in acre-feet over a period of a calendar year.
3. “Allottee” or “Allottees” means any individual or individuals who own or hold a trust allotment or interest in a trust allotment on the Reservation under the authority of the General Allotment Act (24 Stat. 388) and the Flathead Allotment Act (33 Stat. 302), and subject to the terms and conditions of those Acts.
4. “Annual” means during one calendar year.
5. “Arising Under State Law” means, as applied to a water right, a water right created under Montana law and does not include water rights Arising Under Federal Law.
6. “Arising Under Federal Law” means, as applied to a water right, a water right created or defined under Federal law.
7. “Basin 76L” means the hydrologic Basin 76L, including the Flathead River and its tributaries, as shown in Appendix \_\_\_\_.

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8. “Basin 76LJ” means the hydrologic Basin 76LJ, including \_\_\_ and its tributaries, as shown in Appendix \_\_\_.
9. “Call” means the right of the holder of a water right with a senior priority and an immediate need for a recognized use to require a holder of a water right with a junior priority to refrain from diverting water otherwise physically available.
10. “Cfs” means cubic feet per second.
11. “Compact” means this water rights settlement entered into by the Confederated Salish & Kootenai Tribes, the State and the United States.
12. “Consumptive Use” means...
13. “Current Streamflows” means the streamflows, with their seasonal and interannual variability, which are currently observed on Reservation streams and which are protected as part of the Tribal Water Right set forth in Article III.C.1.b.
14. “DNRC” means the Montana Department of Natural Resources and Conservation, or any successor agency.
15. “Effective Date” means the date on which the Compact is finally approved by the Tribes, by the Montana legislature and by the Congress of the United States, and on which the Law of Administration has been enacted and taken effect as the law of the State and the Tribes, whichever date is latest.
16. “Excepted Rights” means [to be developed]
17. “Existing Use” means a use of water under color of Tribal, State or Federal law in existence as of the date the ratification of the Compact by the Montana legislature takes effect under State law, provided that any portion of a Water Right Arising Under State Law within the Reservation that is, at any point after the date the ratification of the Compact by the Montana legislature takes effect under State law, voluntarily relinquished or is determined under State law to be abandoned, relinquished, or have otherwise ceased to exist, shall be stricken from the relevant basin decree as a Water Right Arising Under State Law and be entitled to no further protection as such a right or as an Existing Use pursuant to the Compact.<sup>1</sup>

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<sup>1</sup> This definition may need to be modified to make specific provision for post-1996 wells, as their current legal status is murky at best and they thus may not fall under this definition even though the intent of the parties is to create a process to allow them to be recognized as legally valid in some form.

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18. “Flathead Indian Irrigation Project” or “Project” means the irrigation project developed by the United States to irrigate lands within the Reservation pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat. 302 (1904), and the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908), and includes, but is not limited to, all lands, reservoirs, whether situated on or off the Reservation, easements, rights-of-way, canals, ditches, laterals, or any other Project facilities, headgates, pipelines, pumps, buildings, heavy equipment, vehicles, supplies, records or copies of records and all other physical, tangible objects, whether of real or personal property, used in the management and operation of the Project.
19. Flathead Indian Irrigation Project Cooperative Management Entity” or “CME” means the entity created pursuant to the State-Tribal Cooperative Agreements Act, Title 18, Chapter 11, 101, et Seq., Mont. Code Ann. (2009) by the Tribes and the Flathead Joint Board of Control. Pursuant to the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908), and an agreement signed on April 7, 2010 among the Tribes, the Flathead Joint Board of Control and the United States Department of the Interior, the CME has assumed management and operation of the Project.
20. “Flathead Joint Board of Control” or “FJBC” means...
21. “Flathead Reservation Water Management Board” or “Board” means the entity established by the Compact pursuant to Tribal and State law to administer and enforce the use of all water rights on the Reservation.
22. “Ground Water” means any water that is beneath the ground surface.
23. “Harm” means an adverse effect on a water right.
24. “Hungry Horse Reservoir” means ...
25. “Law of Administration” means the materially consistent body of laws enacted by both the State legislature and the Tribal Council to provide for the administration of surface and ground water within the Reservation, *[as well as those waters that appertain to the operation and maintenance of the Project that are diverted and transported onto the Reservation for Project purposes]*.
26. “Natural Flow” means the water that would exist in a watercourse absent human intervention.
27. “New Development” means the development of a use of the Tribal Water Right set forth in the Compact, from any source, commencing after the date of the ratification of the Compact

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by the Montana legislature takes effect under State law, and encompasses all uses of the Tribal Water Right not defined as Existing Uses.

28. “Non-irrigation Use” means the use of a water right for purposes other than irrigation.
29. “Parties” means the Tribes, the State, and the United States.
30. “Person” means an individual or any other entity, public or private, including the Tribes, the State, and the United States, and all officers, agents and departments of each of the above.
31. “Registered Use” means a use of the Tribal Water Right in existence as of the date of the ratification of the Compact by the Montana legislature takes effect under State law and identified on the Registration of Current Uses compiled by the Tribes and the United States and approved by the DNRC pursuant to Article IV.B.3.
32. “Reservation” means ...
33. “Secretary” means the Secretary of the United States Department of the Interior, or the Secretary’s duly authorized representative.
34. “State” means the State of Montana and all officers, agencies, departments and political subdivisions thereof.
35. “Stock Water” means water used for livestock.
36. “Supplemental Water” means [to be developed]
37. “Lease” means, as applied to the Tribal Water Right, to authorize a Person or Persons to use any part of the Tribal Water Right through a service contract, temporary assignment, or other similar agreement of limited duration.
38. “Tribal Council” means the governing body of the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation.
39. “Tribal Natural Resources Department” or “TNRD” means the governmental subdivision of the Tribes authorized by Tribal Ordinance No. 78-B, as amended, or any successor agency.
40. “Tribal Water Right” means the water rights of the Confederated Salish & Kootenai Tribes, including any Tribal member or Allottee described in Article III of the Compact.

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41. “Tribes” means the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, and all officers, agencies, and departments thereof.
42. “United States” means the Federal government and all officers, agencies and departments thereof.
43. “Water Rights Arising Under State Law” means those valid water rights Arising Under State Law existing as of the date the ratification of the Compact by the Montana legislature takes effect under State law and not subsequently relinquished or abandoned, as those rights are: decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permitted by DNRC; exempted from filing in the State adjudication pursuant to 85-2-222, MCA; or excepted from the permitting process pursuant to 85-2-306, MCA.

**ARTICLE III – TRIBAL WATER RIGHT**

**[To be developed]**

**ARTICLE IV – IMPLEMENTATION OF COMPACT**

**A. Trust Status of Tribal Water Right.** The Tribal Water Right shall be held in trust by the United States for the benefit of the Tribes, their members and Allottees.

**B. Use of Tribal Water Right.**

- 1. Persons Entitled to Use Tribal Water Right.** The Tribal Water Right may be used by the Tribes, or Persons authorized by the Tribes.
- 2. Effect of Non-Use of the Tribal Water Right.** Non-use of all or any portion of the Tribal Water Right described in Article III shall not constitute a relinquishment, forfeiture, or abandonment of such right.
- 3. Registration of Current Uses of the Tribal Water Right.**

Within three (3) years after the Effective Date of this Compact, the TNRD and United States shall provide the DNRC with a report, in a form materially consistent with that of abstracts of water rights decreed by the Montana Water Court, listing all uses of the Tribal Water Right existing as of the Effective Date of the compact. Within six (6) months after receipt of the report, the DNRC must agree, agree in part, or disagree with the report. If the DNRC takes no action by the end of the six month period after the report is received, the report shall be deemed accepted. If the DNRC agrees in part or disagrees with the report, the parties shall meet within ninety (90) days of

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issuance of the DNRC's notice of disagreement in an effort to resolve the issue(s) giving rise to the disagreement. If, after meeting and conferring, the Parties are still unable to come to agreement on the list of existing uses the disagreement will be referred to the Water Management Board for resolution of the dispute.

**4. Change in Uses of the Tribal Water Right.**

Any user of a portion of the Tribal Water Right who proposes to change such use must seek authorization to change the use of that right. Such applications for authorizations to change use shall be heard and decided by the Board pursuant to Article IV.C.4.b of the Compact and the Law of Administration: provided that the Board may not consider any change application unless the applicant has secured the prior approval of the Tribal Council.

**5. Development of Future Uses of the Tribal Water Right.**

The Tribes, or any person with authorization from the Tribes, may develop a new use of the Tribal Water Right after the Effective Date. Such development may only proceed upon the issuance of a permit for the new development by the Board pursuant to Article IV.C.4.a of the Compact and the Law of Administration.<sup>2</sup>

**6. Lease of the Tribal Water Right. This section to be developed**

**C. Administration: Establishment of Flathead Reservation Water Management Board.**

**1. Establishment of Board.** There is hereby established the Flathead Reservation Water Management Board. The Board shall administer and enforce all water rights on the Reservation pursuant to the Compact and the Law of Administration.

**2. Membership.**

- a. Composition.** The Board shall consist of five voting members: two members selected by the Governor of the State, after consultation with holders of Water Rights Arising Under State Law located on the Reservation; two members appointed by the Tribal Council; and one member selected by the other four members. [*The Board shall also have a sixth, non-voting member appointed by the Secretary.*] All members shall be appointed within six months of the Effective Date of the Compact. Should the four appointed members fail to agree on the selection of a fifth voting member within sixty days of the date of



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appointment of the fourth member, or within thirty days after any vacancy in that fifth position occurs, the following procedure shall be utilized:

- i. Within five days thereafter the two members appointed by the Tribal Council shall nominate three persons to serve as a member of the Board and the two members appointed by the Governor shall nominate three persons to serve as a member of the Board;
- ii. Within fifteen days thereafter the two members appointed by the Tribal Council shall reject two of the persons nominated by the two members appointed by the Governor, and the two members appointed by the Governor shall reject two of the persons nominated by the two members appointed by the Tribal Council;
- iii. Within five days thereafter, the remaining two nominees shall be submitted to [TBD] for selection of the third member of the Board.

**b. Term.** Three voting members of the first Board shall serve for four years, and two shall serve for two years. One member appointed by the Governor, one member appointed by the Tribal Council and the fifth voting member shall serve for four years. One member appointed by the Governor and one member appointed by the Tribal Council shall serve for two years. The member appointed by the Secretary shall be appointed for four years. At the expiration of the initial two-year appointments, all Board members shall serve four year terms.

**c. Eligibility.** The eligibility criteria for Board members shall be as set forth in the Law of Administration.

**d. Vacancies.** Vacancies occurring during the term of any Board member, or upon the expiration of the term of any Board member, shall be filled in accordance with the Law of Administration.

**3. Quorum and Vote Required.** Four members of the Board shall constitute a quorum if notice of the time, place, and purpose of the meeting, hearing, or other proceeding has been provided in advance to all members. All Board decisions shall be by affirmative vote of a majority of the Board.

**4. Jurisdiction of the Board.**

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- a. Issuance of New Permits.** Upon the Effective Date of the Compact, the Board shall have exclusive jurisdiction over the issuance of permits for new uses of water on the Reservation, [*including for Excepted Rights*]. No new permits shall be granted for the use of surface water without a mitigation plan approved by the Board pursuant to the Law of Administration; provided that no mitigation plan shall be required if the source of supply for any new use is Supplemental Water.<sup>3</sup> The process for the consideration, issuance or denial of all permits for new uses of water is set forth in the Law of Administration.
- b. Authorizations for Changes in Uses.** Upon the Effective Date of the Compact, the Board shall have exclusive jurisdiction over the issuance of authorizations for changes in uses of water rights on the Reservation. The process for the consideration, issuance or denial of such authorizations is set forth in the Law of Administration.
- c. Enforcement.** Upon the Effective Date of the Compact, the Board shall have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact, and any controversy over the right to the use of water as between the Parties or between or among holders of water rights developed or authorized under the Tribal Water Right, holders of water rights Arising Under State Law, and holders of new permits or change authorizations issued pursuant to Articles IV.C.4.a. and b of the Compact. All controversies cognizable under this subsection shall be heard and resolved pursuant to the Compact and the Law of Administration.<sup>4</sup>

**5. Powers and Duties.**

- a. Hearings.** The Board shall hold hearings upon notice in proceedings before it and shall have the power to administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of documents or other evidence, and to appoint technical experts. The Tribes and the State shall enforce the Board's subpoenas in the same manner as prescribed by the laws of the Tribes and the State for enforcing a subpoena issued by the courts of each respective sovereign in a civil action. The Persons involved in the controversy may present evidence and cross examine any witnesses. The Board shall cause all hearings to be recorded, and shall determine the controversy and grant any declaratory or

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<sup>3</sup> *The issue of permitting new uses from groundwater and whether and how mitigation plans might be required as a condition of such permits remains to be addressed, as does the issue of what might be required in an acceptable mitigation plan.*

<sup>4</sup> *We will need to grapple with how enforcement will work if the dispute is between an on-reservation and off-reservation water user.*

injunctive relief allowed by the Law of Administration, including a temporary order. *[The Board shall not have power to award money damages, attorneys' fees or costs; however it shall have the power to award any kind of equitable relief, including injunctions.]* All decisions of the Board shall be in writing, and, together with a written justification for the decision and any dissenting opinions, shall be served personally or by certified mail on all Persons involved in the proceeding before the Board. All records of the Board shall be open to public inspection.

**b. Employment of Water Engineer.** The Board shall have the authority to employ a Water Engineer to carry out such functions as assigned by the Board pursuant to the Law of Administration, including the supervision of any water commissioners appointed by the Board.

**c. Appointment of Water Commissioner.**

- i. The Board shall have the authority to appoint one or more commissioners to provide day to day administration of water subject to the Compact. Any such commissioner shall act under the supervision of the Water Engineer.
- ii. Under the jurisdiction of the Board, the commissioner(s) shall have the authority to administer and distribute water only on the Reservation and from the off-reservation portions of the facilities of the Flathead Indian Irrigation Project for use within the Project. The authority of any commissioner(s) appointed pursuant to this subsection, as it pertains to portions of the Tribal Water Right used within the Project, extends only to the delivery of water to Project diversion facilities and shall not extend to the administration of that water in Project facilities or on lands served by the Project, which shall remain subject to the oversight of the CME.<sup>5</sup>

## **6. Review and Enforcement of Board Decisions.**

- a. Decisions by the Board shall be effective immediately, unless stayed by the Board. Persons involved in the proceedings before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty days of such decision. The notice of appeal shall be filed with the Board and the court and served upon all Persons involved in the proceeding before the Board, as well

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<sup>5</sup> *We're going to need to spell out very clearly what the exact powers of the Engineer and any Commissioners are – under State law commissioners have very specific and extensive powers – and what sort of law enforcement backup for the engineer and commissioners we might need.*

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as the Tribes, the State and the United States. Service shall be accomplished according to the requirements of the court's rules of procedure.

b. Unless an appeal is filed within thirty days of a final decision of the Board, as provided in Article IV.C.6.a, any decision of the Board shall be recognized and enforced by any court of competent jurisdiction on petition by any Person before the Board in the proceeding in which the decision was made.

c. A court of competent jurisdiction in which a timely appeal is filed pursuant to Article IV. C.6.a, or in which a petition to confirm or enforce is filed pursuant to Article IV. C.6.b, may order such temporary or permanent relief as it considers just and proper subject to the limited waivers of immunity set forth in Article IV.C.7.

d. An appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to Article IV.C.6.a, or in which a petition to confirm or enforce is filed pursuant to Article IV.C.6.b, in the manner and to the same extent as from orders or judgments of the court in a civil action.

e. In any appeal or petition to confirm or enforce the Board's decision, the Board shall file with the court to which appeal is taken the record of the proceedings before the Board within the time and in the manner provided by the court's rules of procedure.

f. The court shall conduct the review on the record made before the Board.

**7. Waiver of Immunity.** The Tribes and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, in order to permit the resolution of disputes under the Compact by the Board, and the appeal or judicial enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribes or the State shall not extend to any action for money damages, costs, or attorneys' fees. The Parties agree that only Congress can waive the immunity of the United States. The participation of the United States in the proceedings of the Board shall be as provided by Congress. The Parties agree to seek congressional approval of waiver language for the United States that is materially consistent with the terms of the waivers provided by the Tribes and the State in this subsection.

**D. Distribution of Water in Times of Shortage.** *This section to be developed.*

**E. Information Sharing.**

- a. Within one year after a hydrologic basin subject to the Compact is finally decreed by the Montana Water Court, the DNRC shall provide the Board, the TNRD and the United States with a report listing all decreed Water Rights Arising Under State Law within that hydrologic basin.
- b. Within one year after the date on which the ratification of the Compact by the Montana legislature takes effect under State law, the DNRC shall provide the TNRD and the United States with a report listing all uses pursuant to permits and water reservations, and those uses excepted from the permitting requirements of State law to the extent that the DNRC has such information. The DNRC shall provide this same report to the Board as soon as practicable.
- c. Pursuant to Article IV.B.3, within three years after the Effective Date, the TNRD and the United States shall provide the Board and the DNRC with a report listing all Existing Uses of the Tribal Water Right, provided that, due to the small and varied nature of the traditional religious and cultural uses identified in Article III.A, such uses need not be included on the report required by this subsection.
- d. On a regular basis and no less frequently than once a year, the Board shall provide the Tribes, the United States and the DNRC with a listing of all New Uses for which a certificate of water right or permit has been issued or a Change in Use has been approved by the Board within the Reservation, and an ownership update for each water right within the Reservation whose owner of record has been changed in the Board's database.
- e. The TNRD, the DNRC, and the United States may agree to modify the reporting requirements set forth in Article IV.E. Such modification is pursuant to, and shall not be deemed a modification of, the Compact.
- f. Any Party or the Board may request additional information from any other Party or the Board to assist in reviewing any report made by one Party to another.

**F. Notice and Reporting.** All notices and reports required by the Compact to be delivered to or served on a Party or the Board shall be sent to:

1. The Chair of the Tribal Council, Pablo, Montana;
2. The Director of DNRC, Helena, Montana; and

3. The Regional Director of the Bureau of Indian Affairs for the Pacific Northwest Region, Portland, Oregon;

4. *Board address to be supplied*

## **ARTICLE V - DISCLAIMERS AND RESERVATION OF RIGHTS**

**[This section under development]**

## **ARTICLE VI - CONTRIBUTIONS TO SETTLEMENT**

**A. State Contribution to Settlement.** *[TBD]*

**B. Federal Contribution to Settlement.** The Parties agree that the Federal contribution to settlement shall be negotiated by the Tribes, the State, and the United States as part of the negotiations on the Federal legislation.

## **ARTICLE VII – FINALITY**

**A. Ratification and Effectiveness of Compact.**

1. The terms of the Compact may not be modified without the consent of all the Parties following the first ratification by any Party.

2. Notwithstanding any other provision in the Compact, the Tribes reserve the unilateral right to withdraw as a Party if:

- a. Congress has not ratified this Compact and authorized appropriations within four years from the date on which the ratification of the Compact by the Montana legislature takes effect under State law ;
- b. Appropriations are not made in the manner contemplated by the federal legislation ratifying this Compact;
- c. The Parties do not reach agreement on the State contribution to the settlement;
- d. The State has not authorized appropriations within five years from the date the Compact is ratified by the United States; or

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- e. Appropriations are not made by the State in the manner contemplated by any agreement for contributions to settlement made pursuant to Article VI.A.
3. The Tribes may exercise their right to withdraw from the Compact under Article VII.A.2 by sending to the Governor of the State and to the Secretary of the Interior by certified mail a resolution of the Tribal Council expressing the Tribes' intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one hundred and twenty days from the date of the resolution. On the date designated in the resolution for Tribal withdrawal, the Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Tribes and entry of a decree in a court of competent jurisdiction.
4. Notwithstanding any other provision in the Compact, the State reserves the unilateral right to withdraw as a Party to the Compact if:
- a. the Tribe and Congress have not ratified this Compact within four years from the date on which the ratification of the Compact by the Montana legislature takes effect under State law ;
  - b. Congress requires a State contribution to settlement that exceeds the contributions described in Article VI.A;
  - c. Congress does not authorize and appropriate the federal share of funding agreed to pursuant to Article VI.B; or
  - d. [*the DNRC does not concur in the list of Existing Uses of the Tribal Water Right pursuant to Article IV.B.3*].
5. The State may exercise its right to withdraw under Article VII.A.4 by sending to the Chair of the Tribal Council and to the Secretary of the Interior a letter delivered by certified mail from the Governor of the State expressing the State's intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one hundred and twenty days from the date of the letter. On the date designated in the letter for State withdrawal, the Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Tribes and entry of a decree in a court of competent jurisdiction.

**B. Incorporation into Decrees.**

1. Within one hundred eighty (180) days of the date the Compact is ratified by the Tribes, the State, and Congress, whichever is latest, the Tribes, the State, and/or the United States shall file, in the general stream adjudication initiated by the State, pursuant to the provisions of 85-2-702(3), MCA, a motion for entry of the proposed decree set forth in Appendix \_\_ as the decree of the water rights held by the United States in trust for the Tribes and the Allottees of the Tribes. If the State Water Court does not approve the proposed decree submitted with the motion within three years following the filing of the motion, the Compact shall be voidable by agreement of the State and the Tribes. If the State Water Court approves the proposed decree within three years, but the decree is subsequently set aside by the State Water Court or on appeal, the Compact shall be voidable by agreement of the State and the Tribes. Any effect of the failure of approval or setting aside of the decree on the approval, ratification, and confirmation by the United States shall be as provided by Congress. The Parties understand and agree that the submission of the Compact to a State court or courts, as provided for in the Compact, is solely to comply with the provisions of 85-2-702(3), MCA, and does not expand the jurisdiction of the State court or expand in any manner the waiver of sovereign immunity of either the United States or the Tribes in the McCarran Amendment, 43 U.S.C. 666, or other provision of Federal law.
2. Consistent with 3-7-224, MCA, setting forth the jurisdiction of the chief water judge, for the purposes of 85-2-702(3), MCA, the review by the State Water Court shall be limited to Article III, and Appendix \_\_ [*proposed decree*], and may extend to other sections of the Compact only to the extent that they relate to the determination of existing water rights. The final decree shall consist of Article III and such other provisions of the Compact as are related to the determination of existing water rights as displayed in Appendix \_\_, and such other information as may be required by 85-2-234, MCA. Nevertheless, pursuant to 85-2-702(3), MCA, the terms of the entire Compact must be included in the preliminary decree without alteration for the purpose of notice.

**C. Disposition of State and Federal Suits.**

1. On issuance of a final decree by the State Water Court or its successor, and the completion of any direct appeals therefrom, or on expiration of the time for filing any such appeal :
  - a. the United States, the Tribes, and the State shall execute and file joint motions pursuant to Rule 41(a), Fed.R.Civ.P., to dismiss without prejudice any and all claims of the Tribes, Tribal members, and Allottees and any and



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all claims made by the United States for benefit of the Tribes, Tribal members, and Allottees in United States v. Abell, No. CIV-79-33-M (filed April 5, 1979). The case may only be resumed if the State or Tribes exercise their rights under Article VII.A; and

(b) the Tribes and the State shall execute and file joint motions to dismiss without prejudice the case entitled Confederated Salish and Kootenai Tribes v. Bud Clinch, Director, Montana Department of Natural Resources and Conservation, and the Montana Department of Natural Resources and Conservation, Montana First Judicial Court, County of Lewis and Clark, Cause No. BDV-2001-253.

2. The Decree shall be filed by the Parties as a consent decree in Abell, or in Federal court as a new proceeding after the dismissal of Abell conditional on agreement by the Parties to seek the necessary State, Tribal, and Federal legislation to implement the remaining provisions of the Compact, if it is finally determined in a judgment binding on the State that the State courts lack jurisdiction over, or that the State court proceedings are inadequate to adjudicate some or all of the water rights asserted in Abell.

**D. Settlement of Tribal Water Right Claims.** [This Section is being developed]

**E. Settlement of Tribal Claims Against the United States.** Waiver of claims against the United States by the Tribes, their members and Allottees shall be as provided by Congress.

**F. Binding Effect.** After the Effective Date of the Compact and entry of a final decree, its terms shall be binding on:

1. The State and any Person using, claiming or in any manner asserting any right under the authority of the State to the use of water in the State; provided that, the validity of consent, ratification, or authorization by the State is to be determined by State law;
2. The Tribes and any Person using, claiming or in any manner asserting any right to the use of the Tribal Water Right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribes or their members, or any rights arising under Tribal law; provided that, the validity of consent, ratification or authorization by the Tribes is to be determined by Tribal and, if applicable, Federal law; and
3. The United States and any Person using, claiming or in any manner asserting any right under the authority of the United States to the use of water in the State; provided that, the

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validity of consent, ratification or authorization by the United States is to be determined by Federal law.

**ARTICLE VIII – LEGISLATION/DEFENSE OF COMPACT**

**A. State Legislation.** The State and the Tribes agree to seek ratification of the Compact by the Montana legislature and any additional State legislation necessary to effectuate the Compact.

**B. Federal Legislation.** The State and the Tribes agree to seek ratification of the Compact by Congress and any additional Federal legislation necessary to effectuate the Compact.

**C. Tribal Legislation.** The State and the Tribes agree to seek ratification of the Compact by the Tribes and any Tribal legislation necessary to effectuate the Compact.

**D. Defense of the Compact.** The Parties agree to defend the Compact after its Effective Date from all challenges and attacks and in all proceedings pursuant to Article VII.B and C, and agree that no provision of the Compact shall be modified as to substance except as may be provided in the Compact, or by agreement among the Parties.

IN WITNESS WHEREOF the representatives of the Confederated Salish & Kootenai Tribes, the State of Montana, and the United States, have signed the Compact on the \_\_\_\_ day of \_\_\_\_, 201\_\_.